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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/583,697	06/20/2006	Georg Curtius	2003P01777WOUS	3523

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INTELLECTUAL PROPERTY DEPARTMENT
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EXAMINER	
WALDBAUM, SAMUEL A	
ART UNIT	PAPER NUMBER
1792	

NOTIFICATION DATE	DELIVERY MODE
09/25/2009	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

NBN-IntelProp@bshg.com

Office Action Summary	Application No.	Applicant(s)	
	10/583,697	CURTIUS ET AL.	
	Examiner	Art Unit	
	SAMUEL A. WALDBAUM	1792	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *05 August 2009*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *11-15 and 18-21* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *11-15 and 18-21* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☒ The drawing(s) filed on *20 June 2006* is/are: a)☒ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Response to Amendment

1. In the amendment filed August 5, 2009 the applicant amended claims 11, 15 and 18, added claim 21, and cancelled claim 16-17. The previous rejection is hereby withdrawn in favor of the new rejection found below.

Double Patenting

2. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

3. Claims 11 and 12 provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 11 and 12 of copending Application No. 10/583636. Although the conflicting claims are not identical, they are not patentably distinct from each other because both applications are claiming the same capacitive level sensor, however it is well within the skill level to mount the specific level sensor to have met the limitations of both application.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Claim Rejections - 35 USC § 103

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

5. The factual inquiries set forth in *Graham* **v.** *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claim 11-15, 19-21 rejected under 35 U.S.C. 103(a) as being unpatentable over Wennerberg et al (U.S. 3,539,153) in view of Adamski et al (U.S. 4,982,606, hereafter `606).

6. Claims 11-14 and 21: `153 teaches a dishwasher (col. 1, lines 1-7) with a chamber for the dishes (col. 2, lines 40-75), with a washing, rinsing and drying steps (col. 3, lines 5-20), with a cleaning agent dispenser (col. 4, lines 40-55) and a fluid carrier (col. 2, lines 45-55), with capacitance fluid level sensors (col. 2, lines 55-75) a circuit connected to the sensor (col. 2, line 40-col. 4, line 55), where it is inherent how a capacitance level sensor works by changing its capacitance based of the dielectric change based off the level of the water. `153 teaches using multiple sensors to determine height, not just one and does not specify the shape of the sensor.

`606 is a fluid level sensor. `606 teaches a rectangular sensor composed of 2 capacitive plates (fig. 2, sensor plates, part 50 and 52 are rectangular) and that the sensor can detect multiple heights of the fluid based of the dielectric constant which changes with the depth of the water (col. 4, lines 40-69, col. 6, line 50-col. 7 line 69) where the sensor is composed two active sensor surfaces (parts 50 and 52) where the electromagnetic field is formed and varies based of the dielectric constant of water and air (col. 4. line 15-col. 5, line 10), allowing one sensor to detect multiple heights. It would have been obvious to one of ordinary skill in the art at the time the invention was made to have use the rectangular sensor taught by `606 in apparatus `153 to detect multiple levels of height of the fluid, thus reducing the number of fluid level sensor to one. Claims directed to apparatus must be distinguished form prior art in terms of structure rather than function. *In re Danly*, 263 F.2d 844, 847, 120 USPQ 528, 531 (CCPA). "[A]pparatus claims cover what a devices is not what a device does" *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1469, 15 USPQ2d 1525, 1528 (Fed. Cir. 1990).

`606 teaches that the sensor probes (part 50 and 52) are made of steel plates (col. 4, lines 30-69, which is electrically conducting), where an electromagnetic field is created that varies with the height of the water (col. 4 line 30-col. 6, line 69). Claims directed to apparatus must be distinguished form prior art in terms of structure rather than function. *In re Danly*, 263 F.2d 844, 847, 120 USPQ 528, 531 (CCPA). "[A]pparatus claims cover what a devices is not what a device does" *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1469, 15 USPQ2d 1525, 1528 (Fed. Cir. 1990).

`606 teaches that the sensor electronics are separate from the sensor probe with the electronic located outside the wash container to kept it separate from the washing water (fig. 1,

col. 5, lines 25-65), where there is an active surface connecting the probes with the sensor elements (fig. 1 and 2, col. 5, lines 10-65). It is well within the skill level of one of ordinary skill in the art at the time the invention was made to have mounted the sensor elements behind the wall of the wash container, thus protecting the sensor element from interacting with water, where the sensor probes are located in the wash container (have to be in container to allow it to interact with the water) where there has to be an active surface between the sensor probes and sensor element. The reason there has to be a active surface is because the change of conditions on the probes have to be transferred to the sensor element, therefore that has to be some active surface connected the sensor probes to the sensor elements.

7. Claim 15: `606 teaches that the sensor is located outside the container (col. 5 line 1-col. 6, line 69), with a sensor surface (parts 50 and 52) isolated from the rinsing fluid by a structure other than the wall of the container, by using a fluoroplastic (col. 5, lines 50-69). See claim 11 above about the sensor element being located behind the wall of the wash container.

8. Claim 18: `606 teaches using electrical means to detect the different capacitance in a qualitative manner to determine the height of the fluid (col. 5 line 25-col. 7, line 65). Claims directed to apparatus must be distinguished form prior art in terms of structure rather than function. *In re Danly*, 263 F.2d 844, 847, 120 USPQ 528, 531 (CCPA). "[A]pparatus claims cover what a devices is not what a device does" *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1469, 15 USPQ2d 1525, 1528 (Fed. Cir. 1990).

9. Claim 19: `606 teaches that a preset value is stored and compared to the level sensor to see if a height is reached (col. 7, lines 35-60). Claims directed to apparatus must be distinguished form prior art in terms of structure rather than function. *In re Danly*, 263 F.2d 844,

847, 120 USPQ 528, 531 (CCPA). "[A]pparatus claims cover what a devices is not what a device does" *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1469, 15 USPQ2d 1525, 1528 (Fed. Cir. 1990).

10. Claim 20: `153 teaches using multiple sensors to determine a low, medium and high height (col. 2, lines 60-70). `606 teaches that the height is constantly monitored to determine the height of the fluid (col. 7 lines 35-65). It would have been obvious to one of ordinary skill in the art at the time the invention was made to have used low, medium and high level of the fluid in apparatus `153 in view of `606 to classify the level of the fluid in specific height ranges. Claims directed to apparatus must be distinguished form prior art in terms of structure rather than function. *In re Danly*, 263 F.2d 844, 847, 120 USPQ 528, 531 (CCPA). "[A]pparatus claims cover what a devices is not what a device does" *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1469, 15 USPQ2d 1525, 1528 (Fed. Cir. 1990).

Response to Arguments

11. Applicant's arguments filed August 5, 2009 have been fully considered but they are not persuasive.

12. Applicant is arguing the statutory double patenting. That argument is moot now that the statutory double patenting is withdrawn.

13. Applicant is arguing that the prior art does not address that the sensor element is located behind the wall of the wash container with an active surface between the wall and the sensor probe on the other side of the wall. This is address in the above rejection.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to SAMUEL A. WALDBAUM whose telephone number is (571)270-1860. The examiner can normally be reached on M-TR 5:45-3:15, every other F 5:45-2:15 est.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Cleveland can be reached on 571-272-1418. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/S. A. W./
Examiner, Art Unit 1792

/FRANKIE L. STINSON/
Primary Examiner, Art Unit 1792